STATE OF MICHIGAN

COURT OF APPEALS

MICHIGAN EDUCATION ASSOCIATION, Plaintiff-Appellant,	UNPUBLISHED January 24, 2003
v	No. 233240 MERC
GARDEN CITY PUBLIC SCHOOLS, Defendant-Appellee.	LC No. 99-000010

Before: O'Connell, P.J., and Griffin and Markey, JJ.

PER CURIAM.

In this bargaining unit clarification case, plaintiff appeals as of right a MERC decision and order excluding the position of technology support supervisor from the bargaining unit for teachers and professional employees. We affirm.

First, plaintiff asserts that the MERC's decision that a person with "total access to, and control of, an employer's information network" is a confidential employee was a substantial and material error of law. We agree.

The MERC's legal rulings will be set aside if they contain "'a substantial and material error of law.'" *Port Huron Ed Ass'n v Port Huron Area School Dist*, 452 Mich 309, 323; 550 NW2d 228 (1996), quoting MCL 24.306(1)(a). Employers are permitted to exclude confidential employees from the collective bargaining process. *Lapeer Co v Teamsters State, Co, & Municipal Employees*, 1998 MERC Lab Op 611,[1] 619, rev'd on other grounds 1999 MERC Lab Op 146. The MERC defines a confidential employee as one "who assists and acts in a confidential capacity to a person or persons who formulate, determine and effectuate management policies with regard to labor relations." *Id*.; see also *Grandville Municipal Executive Ass'n v City of Grandville*, 453 Mich 428, 443; 553 NW2d 917 (1996), citing *Detroit Police Dep't v Detroit Police Command Officers' Ass'n*, 1996 MERC Lab Op 84, 105. However, "the number of confidential exclusions is to be limited to those employees necessary

[1] We accord deference to administrative agency interpretations. See *Cherry Growers, Inc v Agricultural Marketing and Bargaining Bd*, 240 Mich App 153, 164; 610 NW2d 613 (2000); *Port Huron Ed Ass'n v Port Huron Area School Dist*, 452 Mich 309, 322-323, n 18; 550 NW2d 228 (1996).

to perform the required confidential duties." *Lapeer, supra*, citing *Swartz Creek Community Schools v Michigan AFSCME Council 25*, 1988 MERC Lab Op 848.

The MERC's justification for excluding the technology support supervisor, access to the employer's bargaining information, has been previously rejected by the MERC. "[A]n employee who may have physical access to confidential labor relations information, but does not need to see it to perform his or her job, is not confidential." *Lapeer, supra* at 620-621, citing *Centerline Public Schools v Michigan AFSCME Council 25*, 1980 MERC Lab Op 795, 797-798. Defendant does not contend that the disputed employee had any involvement with the collective bargaining process.

Moreover, the MERC does "not assume that because an employee is included in a bargaining unit, that the employee will breach his or her employer's confidence or misuse sensitive information." *Lapeer, supra* at 620. The MERC "has repeatedly rejected contentions of any dual loyalty, conflict of interest, and appearance of impropriety by reason of an employee's right to representation by a labor organization." *Centerline Public Schools, supra* at 798. Thus, the MERC's decision that an employee with total access to the employer's computer network is a confidential employee was a substantial and material error of law. See *Port Huron Ed Ass'n, supra*; MCL 423.216(e).

Next, plaintiff argues that defendant failed to show a need for a fifth confidential exclusion. We agree. This Court considers factual findings made by the MERC to be conclusive where the findings are "'supported by competent, material, and substantial evidence on the record considered as a whole.'" *Port Huron Ed Ass'n, supra* at 322, quoting *Amalgamated Transit Union v Southeastern Michigan Transportation Authority*, 437 Mich 441, 450; 473 NW2d 249 (1991), citing Const 1963, art 6, § 28; MCL 423.216(e).

The MERC places the burden of showing that an employer needs more than one confidential exclusion on the employer. *Lapeer, supra* at 618, 619, 620, citing *City of River Rouge v Metropolitan Council No 23*, 1971 MERC Lab Op 603, and *City of Riverview v Michigan AFSCME Council 25*, 1983 MERC Lab Op 400. Convenience to the employer is not a sufficient justification for creating an additional exclusion. *Lapeer, supra* at 619-620, citing *City of Saginaw v Service Employees Int'l Union*, 1991 MERC Lab Op 253. If an employer cannot demonstrate sufficient need for increasing the number of its exclusions, the MERC will not permit an increase. See *Lapeer, supra* at 620; see also *City of Saginaw, supra*.

Defendant argued only that the technology support supervisor should be deemed confidential, but brought no proofs regarding whether an additional exclusion was necessary. Given the MERC's own strict requirement that exclusions be limited only to those employees who are absolutely necessary to perform confidential duties, the panel should have examined defendant's need for an additional confidential exclusion. See *Lapeer, supra* at 619. Thus, when the MERC granted defendant's request to exclude its technology support supervisor, it did so without the support of substantial, material, and competent evidence on the record. See *Port Huron Ed Ass'n, supra*; *Amalgamated Transit Union, supra*.

Last, plaintiff argues that the technology support supervisor had a fundamental community of interest with the unit's members. We disagree. When the MERC determines bargaining units, it considers "the principle of 'community of interest,' which calls for

employees to have shared interests with others in their bargaining unit." *Michigan Education Ass'n v Alpena Community College*, 457 Mich 300, 303-304; 577 NW2d 457 (1998). Although a "community of interest" denotes similarities among individual positions, it is not necessary that all employees in the unit have "similar duties, skills, or educational qualifications." *Id.* at 306. Thus, the fact that the disputed employee's duties, skills, and educational qualifications differed from that of the unit members does not necessarily exclude him from that unit.

However, the disputed employee had supervisory duties while the others did not. Finding that a position is supervisory is a basis for finding a lack of community of interest. *Gibraltar School Dist v Gibraltar Ed Ass'n*, 1988 MERC Lab Op 229, 231. Besides a statutory exception for firefighters, supervisory and nonsupervisory employees are not permitted to join the same bargaining unit. *Police Officers Ass'n of Michigan v City of Grosse Pointe Farms*, 197 Mich App 730, 733; 496 NW2d 794 (1992), citing *Detroit Bd of Ed v Michigan AFSCME Council 25*, 1978 MERC Lab Op 1140, 1143, and *Labor Council, Michigan Fraternal Order of Police v Emmett Twp*, 182 Mich App 516, 518; 452 NW2d 851 (1990).

In addressing MERC issues, this Court applies the definition of supervisor contained in the National Labor Relations Act, 29 USC § 151 *et seq.*:

> A supervisor is an employee who has the authority, on behalf of his employer "to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." [*Muskegon Co Professional Command Ass'n v Muskegon Co*, 186 Mich App 365, 372; 464 NW2d 908 (1990), quoting 29 USC § 152(11); see also *Michigan Education Ass'n v Clare-Gladwin Intermediate School Dist*, 153 Mich App 792, 797; 396 NW2d 538 (1986).]

The evidence in this case revealed that the disputed employee had the authority to hire, discipline, direct, reward, and recommend action regarding the two employees under his supervision. Moreover, the technology support supervisor's participation in the making of recommendations concerning formulation of department policy and his involvement in budgetary matters further supported the MERC's statement that the position was supervisory. See *Muskegon Co Professional Command Ass'n*, *supra* at 373.

Because the record demonstrated that the technology support supervisor was a supervisory position, the MERC's agreement with defendant that the position did not share a sufficient community of interest with the members of the bargaining unit was supported by substantial, material, and competent evidence on the record. See *Port Huron Ed Ass'n*, *supra*; *Amalgamated Transit Union*, *supra*.

The MERC's exclusion of the disputed employee was not based on his lack of community of interest but instead on an erroneous definition of a confidential employee. Thus, the MERC reached the right result for the wrong reason. However, where a lower tribunal reaches the right result for the wrong reason, this Court affirms the tribunal's decision. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 407, n 72; 651 NW2d 756 (2002). Based on

the community-of-interest standard discussed above, we affirm the MERC's decision.

Affirmed.

/s/ Peter D. O'Connell
/s/ Richard Allen Griffin
/s/ Jane E. Markey